

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Implementation of Section 3)	
of the Cable Television Consumer)	MM Docket No. 92-262
Protection and Competition Act)	
of 1992)	
)	
Tier Buy-Through Prohibitions)	

COMMENTS OF ENCORE MEDIA CORPORATION

ENCORE Media Corporation ("ENCORE Corp."), through undersigned counsel, submits its comments to the Notice of Proposed Rule Making, FCC-92-540, in this matter above-captioned ("Notice").

I. Introduction

ENCORE Corp. owns and operates the television entertainment service known as "ENCORE," which commenced service in 1991 and which selects and packages motion pictures from the 1960's, 1970's and 1980's, exhibiting them principally to cable television subscribers.¹

ENCORE may be offered in various ways to subscribers of cable systems and has obtained carriage on many cable systems because of ENCORE Corp.'s successful efforts to

¹ENCORE is received in about 3.7 million households whereas there are about 55 million total cable television households. By comparison, premium cable programming services, such as HBO and Showtime, have achieved subscriber levels of in excess of twenty million and seven million, respectively, and such "tiered" video programming services as TNT, The Discovery Channel, ESPN and USA Network have achieved subscriber levels exceeding 50 million.

develop ENCORE as a value-added programming service.²

Depending on the marketing plans of the cable operator, ENCORE might be offered on the system, at one and the same time, as cable programming service, as a stand-alone premium (per channel) offering and as a part package of premium (per channel) offerings. Unlike video programming services that are fashioned to be part of a "cable programming service" tier, ENCORE does not accept advertising. It is totally dependent upon subscription fees for its revenue.

The "Tier Buy-Through Prohibitions" of the 1992 Cable Act, section 623(b)(8), accordingly affect substantially the manner in which ENCORE may continue to be available to cable subscribers, and the FCC's regulations will have a major impact upon the growth and development of the channel-constrained competitive per channel³ marketplace of which ENCORE is a part. ENCORE Corp. is greatly concerned that the opportunities to subscribers to receive ENCORE or any other cable service might be curtailed or diminished by over-restrictive interpretations of subsection (b)(8) either by the Commission in its implementing regulations or by cable operators inferring their obligations under those regulations.

²Indeed, within a few months of its inauguration, ENCORE was credited with embodying the multiplex pay service theories by which HBO1, HBO2 and HBO3 were launched. See Cablevision (August 12, 1991) at 25.

³By "per channel" ENCORE Corp. means "per program" offerings as well.

II. Buy-Throughs and "Discrimination"

Subsection (b)(8)(A) must be viewed in the broader context of the 1992 Cable Act's Statement of Policy (at Section 2(b)) to rely on the marketplace "to the maximum extent feasible" to ensure that cable operators continue to expand program service offerings.⁴ As the Commission recognized, the goal of the "buy-through" prohibition is to foster the ability of subscribers to choose freely among available programming service. Notice at 3 citing Senate Report at 77. Achieving the goal requires subsection (b)(8) implementation that is sensitive to ensuring that cable operators have the flexibility to fashion their service offerings in a manner that will not impede the development of the pay television industry or of the emerging pay-per-view component.

Permitting cable operators maximum flexibility under subsection (b)(8)(A) to freely offer, price, discount, package, group, tier or otherwise provide their per channel services will ensure the availability of per channel

⁴The Commission is seeking comment on the interrelationship between the Commission's rate regulation program, to be promulgated pursuant to section 623(b) and (c) with respect to basic service tier and cable programming service rates, and subsection (b)(8)(A). Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 92-544 (released December 24, 1992) ("Rate Regulation Notice"). ENCORE Corp. reserves the opportunity to comment further on this and other related issues in the MM Docket No. 92-266 proceeding, particularly to the extent that subsection (b)(8) implementation cannot be considered independently of rate regulation implementation.

programming and further the diversity goals of the Act. A competitive per channel services market keeps unregulated per channel rates in check and creates an incentive for the cable operator to unbundle video programming service offerings. An inflexible application of subsection (b)(8)(A) would have the reverse effect, creating a static reliance by the cable operator on basic or cable programming service tiers for revenues and the establishment of new service offerings.

The Commission has posed questions and scenarios for comment as to the application of subsection (b)(8)(A).⁵ As a predicate to evaluating any type of cable offering of per-channel services is the impact upon the consumer. Consumers should be allowed to mix and match and have the benefit to get more for less in taking per channel offerings.

Accordingly, any pricing scheme that would permit individual subscriber "customization" of service is

⁵ENCORE Corp. notices that the Commission's interpretation that all cable subscribers will, at a minimum, purchase the basic tier (notice at paragraph 7) is not necessarily a requirement of the 1992 Cable Act. The 1992 Act is consistent with the Senate Report at 77 in that it does not categorically prohibit a cable subscriber from subscribing only to per channel or per program offerings (so long as the must-carry signals are otherwise available over the subscriber's television set through the cable system). Section 623(b)(5)(D), which requires the Commission to implement standards and procedures to assure that subscribers receive notice of the availability of the basic service tier, strongly suggests that the operator may require, but is not required to require, a subscriber to take basic if the subscriber only wants per channel service.

consistent with subsection (b)(8)(A) if available to basic-only subscribers on the same basis as to any other subscriber, irrespective of whether decreasing incremental costs and/or marginal utility to the subscriber is recognized. See discussion at Notice, paragraph 8. The capability to "customize" entails combinations of tiered or per channel offerings, the rates for which may not be regulated under the Act. A non-discriminatory rate structure for such offerings likewise may not be regulated, as recognized by the Commission.⁶ Notice at paragraph 7. The creation of different prices for different combinations of per channel offerings does not implicate the prohibition so long as all such prices and combinations are available to basic-only as well as to other subscribers.

Multiple channel discounts, by the same token, can be offered from a specific group of channels without running afoul of the discrimination prohibition regardless of whether the discounts are channel specific. See Notice at paragraph 8, n.7. The specific group of channels would have to be per channel offerings in order for the subscriber to have the capability to make such a selection.

⁶The Commission's interpretation is in keeping with the concept that volume discounts are not discrimination. Such discrimination would only occur if not all subscribers were entitled to the volume discount on the same basis.

Pay packaging likewise is permissible.⁷ Under the Commission's example (Id.), a subscriber who buys HBO may be offered Showtime for a price lower than a subscriber who does not buy HBO so long as basic-only subscribers can purchase HBO and receive the same Showtime offer on the same basis as any other subscriber. The "buy-through" prohibition extends only to the requirement that basic subscribers not be forced to take cable programming service⁸ as a condition to access per channel offerings.⁹

⁷The Commission is seeking comment on this type offering in the Rate Regulation Notice (at paragraph 96). ENCORE Corp. reserves the opportunity to further speak to this issue in that proceeding.

⁸ENCORE Corp. reserves the opportunity to comment in the rate proceeding on the related issue of whether particular service offering configurations are per channel offerings or whether they are "cable programming service." See Rate Regulation Notice at paragraph 95.

⁹Likewise, consumers should not be deprived of savings pass throughs because of how subsection (b)(8)(A) is applied. To the extent that the Commission does not recognize that the subsection (b)(8) exemption or waiver is available, subsection (b)(8)(A) should not be implicated where there is reciprocity to basic-only subscribers vis-a-vis the sequence in which services are either presented or ordered. For example, on many of today's cable systems, subscribers to cable programming service must be provided a converter to receive the cable programming service. The cost of that converter is oftentimes included in the cable programming service charge, i.e., \$5.00. On those systems, where ENCORE is available to basic-only service tier subscribers, the same equipment would be necessary to receive ENCORE without requiring the subscriber to receive the cable programming service tier, i.e., ENCORE for \$4.00. The cable operator of the system in this example could provide ENCORE to its cable programming service subscribers for a lower charge than it could provide ENCORE directly to its basic-only service tier subscribers because the necessary equipment has already been supplied to cable

(continued...)

The offering of multiple, overlapping tiers of programming on a non-cumulative basis also is permissible under subsection (b)(8)(A). See Notice at paragraph 8. To the extent the tiers overlap the subscriber is being afforded the capability to select groups of channels on a per channel basis.

The cumulative-basis offering of multiple pay tiers also appears permissible under subsection (b)(8). The House Report clarifies that the offering of tiers of commonly identified video programming traditionally or historically offered on a per channel or stand-alone basis is not cable programming service, per force not subject to the "buy-

⁹(...continued)
programming service subscribers. Accordingly, subsection (b)(8)(A) should not be a bar to a cable operator's ability to pass through a cost savings, i.e., ENCORE for \$2.00 to cable programming service subscribers. To interpret subsection (b)(8)(A) as requiring the cable programming service subscriber to take ENCORE for \$5.00 in effect prohibits the operator from passing along savings to consumers. It also defeats the notion of reciprocity because it prohibits the subscriber from mixing and matching its services without suffering penalties. For example, the basic-only subscriber that purchases cable programming service for \$5.00 and is offered ENCORE for an additional \$2.00 should not be recognized as being favored over the basic-only subscriber that purchases ENCORE directly at \$5.00. The second subscriber, in effect, may purchase cable programming service for \$2.00. Any other interpretation would prohibit the operator from passing along the cost savings of shared mutual costs or, on the other hand, requiring the cable operator to in effect recover costs twice. So long as all subscribers achieve the same results, a benefit available to one group of subscribers because of costs should not be prohibited merely because that same benefit cannot be extended to another group of subscribers.

through" restrictions. House Report at 80, 85, 90.¹⁰ Moreover, the specific references contained in the House Report (at 80 and 90) to HBO multiplex services (i.e., HBO1, HBO2 and HBO3) as examples of per channel offerings that specifically are not "cable programming service" illustrate the intended permissibility of per channel tiering, since HBO2 and HBO3 are not and have not been available on a stand-alone basis.¹¹

III. Equipment

In assessing the flexibility with which equipment used in connection with per channel and per program service may be provided, the Commission should remain mindful that the 1992 Cable Act permits unregulated and otherwise unrestricted provision of per channel and/or per program remotes and equipment that are not used in connection with

¹⁰It is not without significance that the Committee used the term "commonly-identified video programming" (House Report at 90) rather than "commonly-owned," in twice referring to the three commonly-owned HBO multiplexed services (i.e., HBO1, HBO2 and HBO3) as an illustration of per channel tiered offerings. House Report at 80, 90.

¹¹The Commission's suggestion in the Rate Regulation Notice (at paragraph 95) that multiplexed service must consist of "essentially the same programming offered on a time-shifted basis" to be exempt from rate regulation (and, perforce, "buy-through" prohibitions) does not take into account that HBO1, HBO2 and HBO3 are not the same programs. In a typical monthly subscription cycle, HBO2 provides an incremental 40% increase in viewing choices over HBO1. HBO2 and HBO3 together offer an increase of 60% over HBO1. Moreover, programming exhibited over other brands of pay services duplicate one another from month-to-month in increments of approximately 20%. There is only so much product available for today's per channel offerings.

subscribers' receipt of the basic service tier or cable programming service. As developments in multimedia networking and pay-per-view indicate, technology could likely lead to separate equipment offerings and packaging associated solely with per channel and/or per program service.¹²

IV. Conclusion

In light of the above, the Commission should adopt anti-"buy through" regulations that reflect and promote the reality and necessity of encouraging flexible per channel and per program service offerings, subject to the guiding principle that basic-only subscribers be afforded the same opportunity as any other subscriber to access such programming on the same or on a reciprocal basis.

Respectfully submitted,

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¹²See, e.g., Multichannel News (November 16, 1992) at 1, ("IBM Zeroes in on Cable Partner?"). See also, e.g., Multichannel News (December 14, 1992) at 1 ("Discovery Debuts Remote for 500-Channel Universe") and Broadcasting (January 4, 1993), supra.

ATTACHMENT 2



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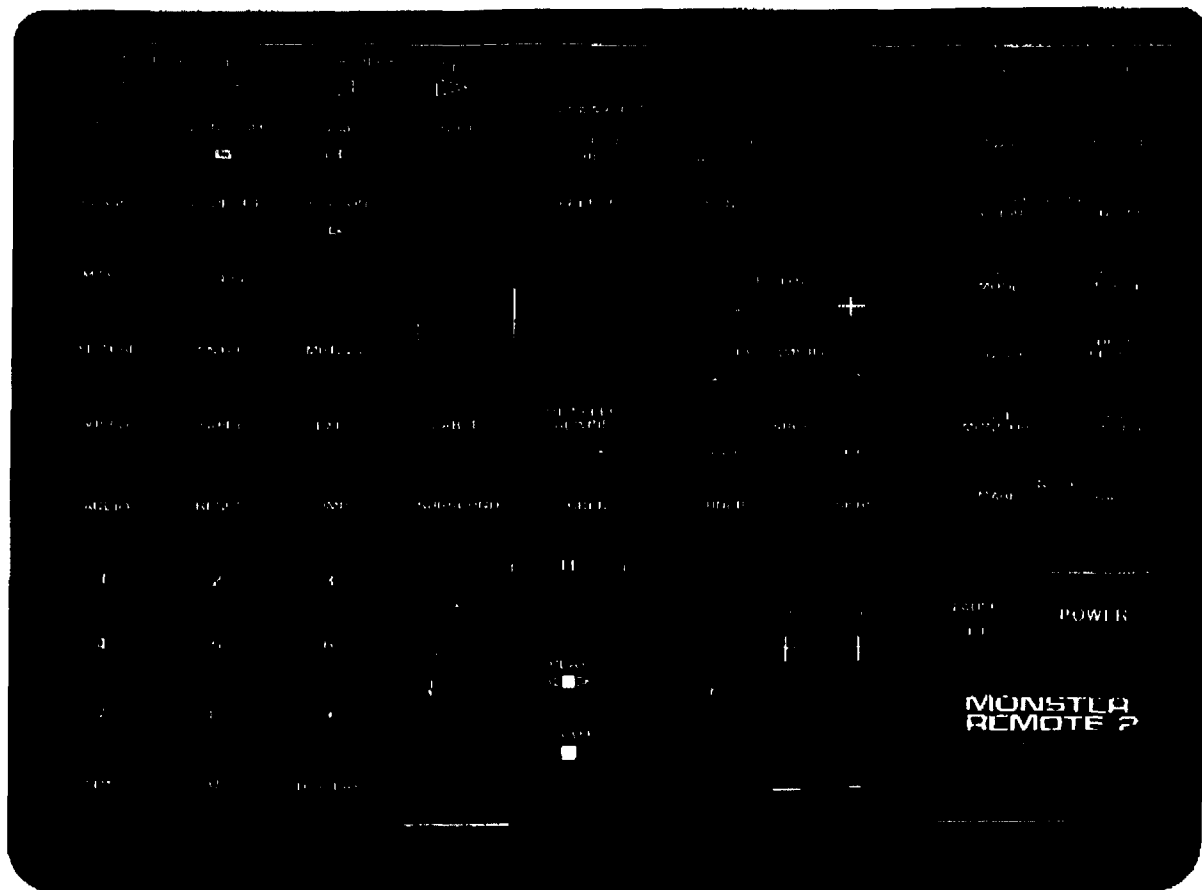
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